

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KENNETH A. DAVIS and ANTHONY J. WARD

Appeal No. 95-1459
Application No. 07/897,616¹

ON BRIEF

Before WINTERS, Administrative Patent Judge, McKELVEY, Senior Administrative Patent Judge, and WEIMAR, Administrative Patent Judge.

WINTERS, Administrative Patent Judge.

DECISION ON APPEAL UNDER 35 U.S.C. § 134

¹ Application for patent filed June 10, 1992. According to applicants, this application is a continuation of Application No. 07/556,934, filed July 23, 1990, now abandoned.

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This appeal is from a decision of the primary examiner rejecting claims 1 through 18 under 35 U.S.C. § 103 as unpatentable over Hill et al. (U.S. Patent No. 4,731,330) "in view of" Molday (U.S. Patent No. 4,452,773); Hess, "Calcium Inhibits Catecholamine Depletion by Reserpine from Carotid Body Glomus Cells," 1 Brain Research Bulletin 359-62 (1976); Collins et al., "Spectral Properties of Fluorescence Induced by Glutaraldehyde Fixation," 29 The Journal of Histochemistry and Cytochemistry no. 3, 411-14 (1981); and Hawkins et al. (U.S. Patent No. 4,489,162) or Coulter (WO 90/04329).

On consideration of the record, including applicants' Appeal Brief (Paper No. 19) and the Examiner's Answer (Paper No. 20), it is

ORDERED that the examiner's decision rejecting claims 1 through 18 under 35 U.S.C. § 103 is reversed.

Neither Hill et al. nor Molday nor Hess is within the field of applicants' endeavor, namely, preserving cells for use as controls or standards in cellular analysis. Furthermore, neither of those references is reasonably pertinent to the particular problem with which the applicants were involved, namely, preparing mammalian cells for use as

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reference particles in an immunoassay where the cells can be dried and stored for later use while maintaining their light scatter properties and maintaining autofluorescence at essentially background levels.

Accordingly, we find that (1) the Hill et al., Molday and Hess references are from a non-analogous art; and (2) the hypothetical person having ordinary skill in this art is not charged with constructive knowledge of these references. In re Wood, 599 F.2d 1032, 1036, 202 USPQ 171, 174 (CCPA 1979). Where, as here, the examiner relies on six references in setting forth the statement of rejection under 35 U.S.C. § 103, and where three of those references are from a non-analogous art, we hold that the cited prior art is insufficient to support a conclusion of obviousness of claims 1 through 18. The examiner does not argue, and we do not find, that the combined disclosures of Coulter, Hawkins et al., and Collins establish a prima facie case of obviousness of the subject matter defined in the appealed claims.

REVERSED

SHERMAN D. WINTERS)
Administrative Patent Judge)

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 FRED E. McKELVEY) BOARD OF
 PATENT Senior Administrative Patent Judge) APPEALS
 AND)
) INTERFERENCES
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 ELIZABETH C. WEIMAR)
 Administrative Patent Judge)

Richard J. Rudrick
Becton, Dickinson and Company
One Becton Dr.
Franklin Lakes, NJ 07417-1880